Munusamy a/l Karuppiah (sole proprietor of MNN Consultancy Services, a firm) v Sang Lee Co Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–504 OF 2007
LOW HOP BING, ABDUL MALIK ISHAK AND WAN ADNAN MUHAMAD JJCA
3 JUNE 2009

Civil Procedure — Functus officio — Principles of — Judgment and orders — Whether order drawn up and perfected can be altered, varied or set aside by same judge or another judge

Civil Procedure — Judgments and orders — Amendment of — Variation or revocation of sealed order — Order clear, unambiguous and reflective of judge's minutes — Whether judge of coordinate jurisdiction could amend earlier judge's order

The plaintiff/appellant filed an action against the defendants/respondents for breach of an agreement relating to rubber land. The plaintiff then applied vide summons in chambers in encl (3) for an ex parte injunction. Prayer (1) in encl (3) was for an injunction against the defendants to restrain them from felling, disposing or tapping the trees in the estate. On 26 June 2006, the first judicial commissioner ('JC1') after hearing both parties granted an ad interim (one month) injunction in favour of the plaintiff to hold over until the hearing of encl (3) on 26 July 2006. JC1's notes stated as follow 'Nothing to be done on the related land until encl 3 is disposed'. The defendants' solicitors in approving the draft order amended it to read that the plaintiff and the defendants were restrained from felling, disposing of or tapping the rubber trees until 26 July 2006. However, the order which the registrar subsequently approved, sealed and perfected provided that the defendants were restrained from doing such acts until encl (3) was heard and determined. The defendants vide summons in chambers in encl (45) sought to amend the sealed order. The second judicial commissioner ('JC2') allowed encl (45) and amended the order to provide that both the plaintiff and the defendants were to be restrained from doing such acts until encl 3 was heard and determined. The plaintiff appealed against the order of JC2. The question for determination was whether the sealed order was consistent with the minutes of JC1.

Held, allowing the appeal with costs here and court below:

(1) (per **Low Hop Bing JCA**) The crucial words used by JC1 'Nothing to

be done to the related land until encl 3 is disposed' should be construed in the light of encl (3) generally and prayer (1) specifically. The sealed order had set out the ad interim (one month) injunction which was to take effect only until encl (3) was heard and determined. The sealed order was clear and unambiguous. It was reflective of JC1's minutes. The question was therefore answered in the affirmative. It was not open to JC2, with coordinate jurisdiction, to amend JC1's order. JC2 had therefore erred in law in amending the sealed order (see paras 18–19).

(2) (per **Abdul Malik Ishak JCA**) Once the order of JC1 had been drawn up and perfected, it could not be altered, varied or set aside because the court was *functus officio*. In other words, having decided a question brought before JC1, JC1 was *functus officio*, and cannot review her own decision. JC2 too cannot review JC1's decision. The aggrieved party on receipt of the order of JC1 had a legal remedy. It was by way of filing an appeal to the Court of Appeal. JC2 had no jurisdiction to act as an appellate court to amend the order of JC1 (see paras 22–23).

[Bahasa Malaysia summary

Plaintif/perayu memfailkan satu tindakan terhadap defendan-defendan/responden-responden untuk kemungkiran satu perjanjian berkenaan dengan tanah getah. Plaintif kemudian memohon melalui saman dalam kamar dalam lampiran (3) untuk injunksi ex parte. Permohonan (1) dalam lampiran (3) adalah untuk injunksi terhadap defendan-defendan bagi menghalang mereka daripada menebang, melupuskan atau menoreh pokok-pokok di ladang tersebut. Pada 26 Jun 2006, pesuruhjaya kehakiman yang pertama ('PK1') selepas mendengar kedua-dua pihak memberikan injunksi ad interim (sebulan) berpihak kepada plaintif 'to hold over' sehingga perbicaraan lampiran (3) pada 26 Julai 2006. Nota-nota PK1 menyatakan seperti berikut, 'Nothing to be done on the related land until encl 3 is disposed'. Peguamcara defendan-defendan dalam meluluskan draf perintah membuat pindaan yang dibaca, plaintif dan defendan-defendan dihalang daripada menebang, melupuskan atau menoreh pokok-pokok getah sehingga 26 Julai 2006. Walau bagaimanapun, perintah yang kemudiannya diluluskan, dimeterai dan disempurnakan oleh pendaftar menyatakan bahawa defendan-defendan dihalang daripada melakukan perbuatan sedemikian sehingga lampiran (3) telah didengar dan diputuskan. Defendan-defendan melalui saman dalam kamar dalam lampiran (45) memohon untuk meminda perintah termeterai tersebut. Pesuruhjaya kehakiman kedua ('PK2') membenarkan lampiran (45) dan meminda perintah untuk menyatakan yang kedua-dua plaintif dan defendan-defendan adalah dihalang daripada melakukan perbuatan sedemikian sehingga lampiran (3) telah didengar dan diputuskan. Plaintif merayu terhadap perintah PK2. Persoalan untuk penentuan adalah sama ada perintah yang termeterai adalah selaras dengan minit-minit PK1.

Diputuskan, rayuan dibenarkan dengan kos di mahkamah ini dan di Mahkamah Tinggi:

(1) (oleh **Low Hop Bing HMR**) Perkataan-perkataan penting yang digunakan oleh PK1 'Nothing to be done to the related land until encl 3 is disposed' harus ditafsirkan berdasarkan lampiran (3) secara umumnya dan permohonan (1) khususnya. Perintah termeterai tersebut menyatakan bahawa injunksi ad interim (sebulan) hanya berkesan sehingga lampiran (3) didengar dan diputuskan. Perintah termeterai adalah terang dan jelas. Ianya reflektif terhadap minit-minit PK1. Soalan tersebut oleh kerana itu dijawab sebagai benar. Ia bukan terbuka kepada PK2, dengan bidang kuasa yang sama, bagi meminda perintah PK1. PK2 oleh itu telah khilaf dari segi undang-undang dalam meminda perintah termeterai tersebut (lihat perenggan 18–19).

(2) (oleh **Abdul Malik Ishak HMR**) Sebaik sahaja perintah PK1 dibuat dan disempurnakan, ia tidak boleh, diubah atau diketepikan kerana mahkamah adalah *functus officio*. Dengan erti kata lain, selepas memutuskan satu soalan yang dikemukakan kepada PK1, PK1 adalah *functus officio*, dan tidak boleh mengkaji semula keputusannya. PK2 juga tidak boleh mengkaji semula keputusan PK1. Pihak yang terkilan apabila menerima perintah oleh PK1 mempunyai remedi undang-undang. Ianya dengan cara pemfailan rayuan kepada Mahkamah Rayuan. PK2 tidak mempunyai bidang kuasa untuk bertindak sebagai mahkamah rayuan untuk meminda perintah PK1 (lihat perenggan 22–23).]

Notes

For a case on principles of functus officio, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 2833.

For cases on amendment of judgments and orders, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4020–4026.

Cases referred to

Arab-Malaysia Finance Bhd v Malacca Development Corp Sdn Bhd & Ors [1997] 5 MLJ 685; [1997] 3 CLJ 51, HC (refd)

Armitage v Parsons [1908] 2 KB 410, CA (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (refd)

Becker v Noel & Anor [1971] 1 WLR 803, CA (refd)

Boyle v Sacker (1888) 39 Ch D 249, CA (refd)

Burgoine v Taylor (1878) 9 Ch D 1, CA (refd)

City Housing Trust Ltd, In re; Kolb v The Company & Ors [1942] Ch 262, Ch D (refd)

Datuk M Kayveas v PV Das (for himself and on behalf of People's Progressive Party of Malaysia) [1997] 3 MLJ 671, CA (refd)

Gist, In re (A Person of Unsound Mind) [1904] 1 Ch 398, CA (refd)
Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)
Lam Kong Co Ltd v Thong Guan Co Pte Ltd [2000] 4 MLJ 1; [2000] 3 AMR 3304; [2000] 3 CLJ 769, FC
Lee Phet Boon v Hock Thai Finance Corp Bhd [1994] 2 MLJ 448, HC (refd)
Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd [2006] 4 MLJ 113; [2006] 3 CLJ 177; [2006] 3 AMR 725, FC (folld)
Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374, FC (folld)
Scotch Leasing Sdn Bhd (In receivership) v Chee Pok Choy & Ors [1997] 2 MLJ 105, SC
Tan Poey Kheng v Ma Peng Kiat [1984] 1 MLJ 58, HC (refd)
United Malayan Banking Corpn Bhd v Syarikat Perumahan Lunas Sdn Bhd [1988] 1 MLJ 546, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 45, 46, 47, 48, 49, 67(1)
Courts of Judicature (Amendment) Act 1994
Rules of the High Court 1980 O 20 r 11, O 28 r 4(1), O 32 r 6, O 35 r 2, 2(1), (2)

Appeal from: Civil Suit No S7–22–433 of 2006 (High Court, Kuala Lumpur)

RK Nathan (Vinod R Kamalanathan with him) (Vinod Kamalanathan & Associates) for the appellant.
Chan Vy Sing (Lee & May) for the first, second and fourth respondents.
Prasad Abraham (Prasad Abraham & Associates) for the third respondent.

Low Hop Bing JCA:

APPEAL

[1] The parties herein are referred to in their respective capacities in the High Court.

[2] This appeal lodged by the plaintiff revolves around two orders made by two learned judicial commissioners ('JC1' and 'JC2'). The order made by JC2 purports to amend JC1's order which has previously been approved, sealed and perfected by the learned registrar.

FACTUAL BACKGROUND

[3] Pursuant to an alleged breach of agreement (relating to rubber land) by the defendants, the plaintiff filed an action against the defendants, praying for, inter alia, an injunction.

[4] The plaintiff then applied, vide summons in chambers in encl (3), for an ex parte injunction. Prayer (1) of the plaintiff's application ('prayer (1)') in encl (3), where relevant, merits reproduction below:

> 1 Satu injunksi terhadap Defendan-Defendan supaya dengan ini dihalang daripada mengambil apa-apa langkah di dalam apa-apa cara pun dan melalui apa-apa bentuk sama ada melalui sendiri satu melalui kakitangan dan/atau agennya untuk memasuki satu kontrak dengan dan/atau membenarkan mana-mana pihak selain daripada Plaintif untuk menebang dan/atau menoreh dan/atau melupuskan pokok-pokok di ladang tersebut.

Our translation

> 1 An injunction against the Defendants who are hereby restrained from taking any step in any manner whatsoever and howsoever, whether personally or by their employees and/or agents, to enter into any contract with and/or permitting any party, other than the Plaintiff, to fell and/or to tap and/or to dispose of the trees in the estate.

[5] The ex parte application was opposed. Upon hearing counsel, on 26 June 2006, JC1 granted an ad interim (one month) injunction in favour of the plaintiff to hold over until the hearing of encl (3) on 26 July 2006. At p 121 of the appeal record, JC1's notes of proceedings ('the minutes'), where relevant, read as follows:

> Nothing to be done on the related land until Enclosure 3 is disposed.
>
> Undertaking as to damages.
>
> (H) 26/7/06 at 9.30 am.
>
> Written submission.

[6] Based on the above minutes, the plaintiff's solicitor drafted the order in accordance with prayer (1).

[7] When the plaintiff's solicitors sent the draft order to the defendant's solicitors for approval, defendants' solicitors made amendments thereto, so as to read, where relevant, as follows:

> 1 Satu injunksi secara interim diberikan supaya kedua-dua pihak Plaintiff and Defendan-defendan dihalang daripada menebang, melupuskan atau menoreh pokok-pokok getah di atas hartanah yang relevan sehingga 26.7.2006 iaitu tarikh perbicaraan permohonan Lampiran 3.

Our translation

> An interim injunction be granted whereby the Plaintiff and the Defendants are restrained from felling, disposing of or tapping the rubber trees on the relevant land until 26.7.2006 ie the date of hearing of the application in Enclosure 3.

[8] Vide letter dated 4 July 2006, the plaintiff's solicitors forwarded the draft order, as amended, to the learned registrar for approval.

[9] The order which the registrar subsequently approved, sealed and perfected on 27 June 2006 ('the sealed order') appears at pp 147–148 of the appeal record, and, where relevant, reads as follows:

> 1 Satu injunksi terhadap Defendan-defendan supaya dengan ini dihalang daripada mengambil apa-apa langkah di dalam apa-apa cara pun dan dihalang daripada melalui apa-apa bentuk sama ada melalui sendiri atau melalui kakitangan dan/atau agennya untuk memasuki satu kontrak dengan dan/atau membenarkan mana-mana pihak selain daripada Plaintif untuk menebang, melupuskan atau menoreh pokok-pokok getah di atas hartanah tersebut sehingga permohonan Lampiran 3 di dengar dan diputuskan.

Our translation

> 1 An injunction against the Defendants who are hereby restrained from taking any step, in any manner whatsoever and howsoever, whether personally or by employees and/or agents, to enter into any contract with and/or permitting any party other than the Plaintiff to fell, dispose of or tap the rubber trees on the land until the application in Enclosure (3) is heard and determined.

[10] Thereafter, vide summons in chambers in encl (45), the defendants sought to amend the sealed order.

[11] On 23 May 2007, JC2 heard the defendant's application in encl (45) and allowed the amendments. The order, together with the amendments allowed by JC2, where relevant, reads as follows:

> 1 Satu injunksi secara ad interim diberikan supaya kedua-dua pihak Plaintif dan Defendan-defendan dan/atau kakitangan dan agen dihalang daripada menebang, melupuskan atau menoreh pokok-pokok getah di atas hartanah yang relevan sehingga permohonan Lampiran 3 didengar dan diputuskan.

Our translation

A 1 An ad interim injunction is granted whereby both the Plaintiff and the Defendants and/or employees and agents be restrained from felling, disposing of or tapping the rubber trees on the relevant land until the application in Enclosure 3 is heard and determined.

B **[12]** Being dissatisfied with JC2's order, the plaintiff appealed to this court.

[13] On 15 September 2008, we allowed with costs the plaintiff's appeal, set aside JC2's order and reinstated the sealed order.

C **[14]** The defendants had subsequently obtained leave to appeal to the Federal Court. We now give our grounds.

JC1'S MINUTES AND SEALED ORDER

D **[15]** In essence, the plaintiff's learned counsel Dato' R Kamalanathan (Mr Vinod Kamalanathan with him) submitted that the sealed order is the correct order as it clearly reflects the intention of JC1 vide the minutes, specifically E 'Nothing is to be done to the related land until encl 3 is disposed'.

[16] Learned counsel Mr Chan Vy Sing, for the first, second and fourth defendants, and Mr Prasad Abraham for the third defendant, joined hands and maintained that JC2 has correctly allowed the defendants' amendments F vide encl (45).

[17] On the basis of the above conflicting submissions, we are of the view that the issue for determination in the instant appeal may be identified briefly as follows:

G

> Whether the sealed order at pp 147–148 of the appeal record, in particular p 148, is consistent with the minutes of JC1 at p 121 of the appeal record?

H **[18]** In our judgment, the crucial words used by JC1 at p 121 of the appeal record viz 'Nothing to be done to the related land until encl 3 is disposed' should be construed in the light of encl (3) generally and prayer (1) specifically. We note that the sealed order has set out the ad interim (one month) injunction which was to take effect only until the plaintiff's I application in encl (3) is heard and determined. This is the true construction of JC1's minutes ie to hold over, pending the hearing and determination of encl (3). The sealed order is clear and unambiguous. It is intended to be an ad interim injunction until 26 July 2006 only. It is reflective of JC1's minutes at p 121 of the appeal record. We therefore answer the above question in the

affirmative.

CONCLUSION

[19] In the circumstances, it is not open to JC2, with coordinate jurisdiction, to amend JC1's order. JC2 has therefore erred in law in amending the sealed order at pp 147–148 of the appeal record. Hence, this appeal is allowed with costs here and in the court below. JC2's order allowing the amendment is set aside and the sealed order is reinstated. Deposit to be refunded to the plaintiff as appellant.

[20] My learned brother Abdul Malik Ishak JCA has also prepared his judgment in support of mine.

Abdul Malik Ishak JCA:

[21] This is my supporting judgment to that of my learned brother Low Hop Bing JCA who has written an impeccable judgment; very comprehensive and precise. I do not propose to narrate the facts for they have been lucidly set out by my learned brother Low Hop Bing JCA and I gratefully adopt them in this supporting judgment.

[22] The appeal raises an interesting point. It is whether JC2 can revise and amend the approved, sealed and perfected order of JC1. It turns on the application of the latin phrase functus officio. It is trite that once the order of JC1 has been drawn up and perfected, it cannot be altered, varied or set aside because the court is functus officio. In other words, having decided a question brought before JC1, JC1 is functus officio, and cannot review her own decision. A *fortiori* JC2 too cannot review JC1's decision. It is as simple as that.

[23] The aggrieved party on receipt of the order of JC1 has a legal remedy. It is by way of filing an appeal to the Court of Appeal. Section 67(1) of the Courts of Judicature Act 1964 enacts that the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought. It is germane to mention that Mohamed Dzaiddin FCJ (later the Chief Justice of Malaysia) in *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1; [2000] 3 AMR 3304; [2000] 3 CLJ 769 (FC) said that the Court of Appeal today no longer has any original jurisdiction after the repeal of ss 45–49 of the Courts of Judicature Act 1964

by the Courts of Judicature (Amendment) Act 1994 (Act A886) and what remains is its criminal and civil appellate jurisdiction. Recently His Lordship's decision has been adopted by another panel of the Federal Court in the case of *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113; [2006] 3 CLJ 177; [2006] 3 AMR 725 (FC). *Metramac* reiterated the obvious and that would be that the Court of Appeal possesses only appellate jurisdiction.

[24] There are exceptions which allow JC2 to set aside or amend JC1's order without the need to file an appeal to the Court of Appeal and these exceptions are set out in the Rules of the High Court 1980 ('RHC') and in the relevant authorities. They may be stated as follows:

(a) Order 20 r 11 of the RHC states that clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court by summons without an appeal. This rule is now known as the 'slip rule'. Its applicability is rather limited. It is confined to cases where there has been clerical mistake or error arising from an accidental slips or omissions committed by the officers of the court as envisaged in *In re Gist (A Person of Unsound Mind)* [1904] 1 Ch 398, as well as by the parties themselves as evidenced in the case of *Armitage v Parsons* [1908] 2 KB 410 (CA), or in a situation where there is a mistake as to the date like what had happened in the case of *In re City Housing Trust Ltd; Kolb v The Co & Ors* [1942] Ch 262. However, a caveat must be inserted. It is this. That the power to amend or vary an order must be exercised with the utmost care. It must be done judicially and not capriciously. It must be exercised in exceptional cases particularly where the justice of the case demands it. The error must be confined to an error in expressing what the court intended at the time when the order was made.

(b) A final order may be set aside or amended without the need to appeal in a situation where the order is made in the absence of the other party at the hearing as envisaged in O 28 r 4(1) of the RHC; Order 32 r 6 of the RHC; and O 35 r 2 of the RHC. It is interesting to read the case of *United Malayan Banking Corpn Bhd v Syarikat Perumahan Lunas Sdn Bhd* [1988] 1 MLJ 546. That was a case where the court there was not functus officio but had all the powers to vary or revoke an ex parte order for sale if the court deemed it fit to do so. That case too also decided that an order that was made in an originating summons where the defendant was served but failed to enter an appearance and was absent at the hearing was held to be an order in the nature of an ex parte and that being the case it was held that the ex parte order can be set aside by means of a summons in chambers application without the need to go by way of an appeal.

(c) In a situation where both parties had appeared and argued the matter, the Supreme Court in *Scotch Leasing Sdn Bhd (In receivership) v Chee Pok Choy & Ors* [1997] 2 MLJ 105 held that the court would be functus officio upon the order being perfected and therefore the court cannot hear a summons in chambers to set aside an order for sale on the ground simply of lack of jurisdiction. It is pertinent to note that the Federal Court vigorously approved the case of *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374 notwithstanding the fact that that case was decided under the inherent jurisdiction of the court and not pursuant to the rigours of O 28 r 4(1) of the RHC.

(d) Order 32 r 6 of the RHC states that the court may set aside an order made ex parte. This rule is a good piece of legislation because it protects the basic right of the litigants in that the party who has not been heard may apply to the court to have that order discharged forthwith (*Boyle v Sacker* (1888) 39 Ch D 249, at p 251; *Note Becker v Noel & Anor* [1971] 1 WLR 803 (CA); and *Tan Poey Kheng v Ma Peng Kiat* [1984] 1 MLJ 58). It is trite law that a judge does not become *functus officio* after issuing an ex parte order. In an originating summons procedure under O 28 r 4(1) of the RHC, an ex parte order may be varied or revoked by a subsequent order of the court on such terms as it thinks fit. According to cases like *Lee Phet Boon v Hock Thai Finance Corp Bhd* [1994] 2 MLJ 448; and *Datuk M Kayveas v PV Das (for himself and on behalf of People's Progressive Party of Malaysia)* [1997] 3 MLJ 671 (CA), an application to set aside an ex parte order is not an appeal and a court of co-ordinate jurisdiction may exercise the power to vary or revoke it.

(e) Order 35 r 2(1) of the RHC states that any judgment or order obtained where one party does not appear at the trial may be set aside by the court, on the application of that party, on such terms as it thinks just. And according to O 35 r 2(2) of the RHC such an application must be made within seven days after the trial. Thus, according to the case of *Burgoine v Taylor* (1878) 9 Ch D 1, at p 5, where judgment was entered in the absence of the solicitor as a result of the solicitor's negligence in failing to look at the correct hearing list, the judgment may be set aside.

[25] In regard to *functus officio*, the case of *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 (FC), immediately comes to the forefront. In that case, the High Court judge had made an order for sale in a foreclosure proceeding. The order was made after hearing all the parties and was made despite a claim of *non est factum* and allegations of fraud and forgery by the respondent. The order was drawn up and perfected. There was no appeal against it. The respondent applied to set aside the judgment and the application was refused. Later, the respondent applied, once again, to set aside the previous orders. The High Court judge then proceeded to set aside his own order. The appellant appealed. Chang Min Tat FJ speaking for the

Federal Court held that the High Court judge was functus officio. His Lordship also held that the High Court judge had no power under any application in the same action to alter, vary, or set aside a judgment regularly obtained after it had been entered or an order after it has been drawn up except under the 'slip rule', so far as it is necessary to correct errors in expressing the intention of the court, unless it is a judgment by default or made in the absence of a party at a trial or hearing. His Lordship also held that if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment. Finally, His Lordship held that the High Court judge had no jurisdiction to set aside his own order and that the original order must be restored, leaving it to the respondent to take out a fresh action to set aside the order on the ground of fraud. At p 144 of the report, this was what His Lordship said:

> Clearly the court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in O 28 r 11 of the Rules of the Supreme Court 1957 (O 20 r 11 of the Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the court (*Re St Nazaire Co* 12 Ch D 88; *Kelsey v Doune* [1912] 2 KB 482; *Hession v Jones* [1914] 2 KB 421), unless it is a judgment by default or made in the absence of a party at the trial or hearing. But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment (*Hip Foong Hong v Neotia & Co* [1918] AC 888; and *Jonesco v Beard* [1930] AC 298). The hearing of the action will in a proper case be expedited (*Smith v Peizer* 65 SJ 607).

[26] Mohd Azmi FCJ writing a separate judgment in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75 made reference to the case of *Hock Hua Bank Bhd v Sahari bin Murid* in the context of invoking the concept of the justice of the case that enables the court to correct a serious defect in the order. This was what His Lordship said (see p 409 (MLJ); pp 92–93 (CLJ) of the report):

> It is of course settled law as laid down by the Federal Court in *Hock Hua Bank Bhd*'s case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank Bhd*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court ... which a person affected by the order is entitled to apply to have set aside

ex debito justitiae in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make.

[27] Continuing further down on the same page, this was what His Lordship Mohd Azmi FCJ said:

For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

[28] Augustine Paul JC (now FCJ) in *Arab-Malaysia Finance Bhd v Malacca Development Corp Sdn Bhd & Ors* [1997] 5 MLJ 685; [1997] 3 CLJ 51, had occasion to ventilate his views in regard to the power of the court to review its earlier order which has not been perfected with a view to withdraw, alter or modify it. His Lordship sets out the law lucidly in this way (see p 62 of the report):

Before I proceed any further I shall first determine the extent to which a court can amend an order that it has made in the context of the application before me. It is settled law that after a judgment or order has been perfected amendments may only be made to it in relation to clerical errors, accidental slips and omissions as provided by O 20 r 11 of the Rules of the High Court 1980 (see *Khoo Cheng Tat v Lim Soon Teck* [1982] 1 MLJ 289; *Tak Ming Co Ltd v Yee Sang Metal Supplies Co* [1973] 1 WLR 300; *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143). However, the court has an inherent power to correct errors to give a clear expression to its intentions in the judgment or order which has been perfected (see *Pearlman (Veneers) SA (Pty) Ltd v Bernhand Bartels* [1954] 1 WLR 1457). Such a power exists to enable the court to correct the record to make it consistent with the judgment or order which it obviously meant to pronounce (see *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 221; *Hatten v Harris* [1892] AC 560; *Koperasi Perumahan Kotawira Bhd v Kadir bin Kassim & Ors* [1991] 2 CLJ 1529). A judge may set aside an order founded wholly upon his own error as to a fact, and not upon any mistake in his deliberation, even though the order be passed and entered (see *Hall v Harris* (1900) 25 VLR 455).

[29] My learned brother Low Hop Bing JCA while sitting on the High Court bench, had occasion to ventilate his views in regard to the 'slip rule' pursuant to O 20 r 11 of the RHC as well as the inherent power of the court to amend an earlier order together with the doctrine of functus officio. The headnotes would bear out what His Lordship had said in that case (see pp 171–172 of the report):

> (a) Errors arising from accidental slips or omissions may be corrected under the slip-rule pursuant to O 20 r 11 of the RHC, even though the judgment or order as drawn does in fact represent the intention of the court at that time. The slip-rule would also appear to cover the errors made by a litigant or his counsel.
>
> (b) Additionally, the court has the inherent power to correct errors to give a clear expression to its intentions in the judgment or order which has been perfected. Such a power exists to enable the court to correct the record to make it consistent with the judgment or order which it obviously meant to pronounce.
>
> (c) The doctrine of functus officio does not forbid the amendment of any judgment or order under the slip-rule. (The slip-rule may be regarded as an exception to the doctrine). The doctrine also cannot subjugate the inherent jurisdiction of the court to dispense justice in a particular case.

[30] All these salient legal principles weighed heavily in favour of the plaintiff. The amendments to the draft order by the defendants' solicitors were approved by the plaintiff's solicitors. And the draft order was subsequently approved, sealed and perfected on 27 June 2006 by the registrar and that would constitute the order emanating from JC1. It must be emphasised that the order of JC1 was based on an opposed ex parte application (see pp 119–124 of the appeal record). It was contested. Learned counsel on both sides submitted before JC1. The only legal remedy open to the defendants would be to appeal to the Court of Appeal against the order of JC1. JC2 has no jurisdiction to act as an appellate court to amend the order of JC1. JC2 had gone into the merits of the case and substituted the order of JC1 which has been approved, sealed and perfected. When over-ruling and setting aside the order of JC1, JC2 was acting as an appellate judge and this cannot be condoned.

[31] For the reasons adumbrated above, I would make those orders as made by my learned brother Low Hop Bing JCA. I now make those orders accordingly.

Appeal allowed with costs here and court below.

Reported by Kanesh Sundrum